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October 27, 2010

By ECF Only

Hon. Raymond J. Dearie  
Chief Judge  
United States District Court for the Eastern District of New York  
Theodore Roosevelt United States Courthouse  
225 Cadman Plaza East  
Brooklyn, New York 11201

RE: Credico, et al. v. New York State Board of Elections, et al.  
Docket No. 10-Civ. 4555 (RJD) (CLP)  
U.S. District Court, E.D.N.Y.

Dear Judge Dearie:

On October 6, 2010, plaintiffs commenced this action, and moved this Court for a temporary restraining order and a preliminary injunction, to direct defendants to place the name of plaintiff Randy Credico on the statewide ballot on the lines (or columns) of both the Libertarian Party, and the Anti-Prohibition Party, rather than on just one line or column, as provided in N.Y. Elec. L. §7-104(4)(e). Although the TRO was denied, the Court, after considering the parties' submissions and oral argument, granted plaintiffs a preliminary injunction, providing notice of the decision by telephone on October 22, and issuing a

written decision on October 25, 2010 (the "October 25 Decision"). Upon request by letter by defendants, the Court stayed enforcement of the injunction, pending a conference the following day. At the conference on October 26, the Court confirmed the stay of enforcement of the injunction, and also considered plaintiffs' application for alternative relief, in the form of a notice proposed to be posted at the voting locations across the state, as follows:

**PLEASE TAKE NOTICE** that Randy A. Credico, candidate for United States Senate (6-year term), appears on the ballot only on Line or Column H (for the Libertarian Party), although he is also a candidate for that office of the Anti-Prohibition Party (whose other candidates appear on Line or Column I). All votes cast for Mr. Credico will be counted as votes for both independent bodies.

The Court requested a written submission by defendants on the issue in the evening of October 26, and a response by plaintiffs thereafter. This letter is submitted in support of plaintiffs' proposed alternative relief, and in response to the letter of Solicitor General Barbara D. Underwood, Esq., counsel for defendants, dated October 26, 2010.

1. Defendants' Constitutional Violation Requires a Remedy

Defendants suggest that posting plaintiffs' proposed notice (the "Notice") "would unfairly call voters' attention to Mr. Credico immediately before they vote, to the detriment of other candidates in the contest for United States Senate." But, the Court has already ruled that the existing layout of the statewide ballot, as regards the candidates for United States Senate (6-year term), likely violates the constitutional rights of plaintiffs, in that, inter alia, it violates the equal protection clause of the 14th Amendment. Although that violation was brought to defendants' attention by plaintiff Randy Credico himself, by letter dated and faxed September 22, 2010 (see Complaint, Exhibit 2), defendants declined to correct that violation at a time when it was still possible to do so. The result, of course, is

a "detriment" to Mr. Credico in relation to the other candidates in the contest for that elected office. Any possible effective remedy, therefore, would necessarily be "to the detriment of other candidates in the contest for United States Senate." Indeed, that is exactly the point and purpose of plaintiffs' entire motion, and entire case. Similarly, defendants claim that nothing should "unfairly call voters' attention to Mr. Credico immediately before they vote." But the layout of the existing ballot "unfairly" reduces voters' attention to Mr. Credico immediately before they vote. Defendants' current claims demonstrate that they lack appreciation for the extent of harm they have likely caused plaintiffs by their enforcement of N.Y. Elec. L. §7-104(4)(e), as already found by this Court.

In their footnote 1, defendants refer to N.Y. Elec. L. §7-104(1) "which standardizes the form of ballots and requires that names of candidates and their nominating organizations be printed in uniform size and style." Defendants claim that plaintiffs' proposed notice "violates the spirit of Election Law §7-104(1)." But two of Credico's opponents are provided with multiple lines on the statewide ballot, while Credico is unconstitutionally (as claimed by plaintiffs and found likely by the Court) limited to one line. Some remedy must be afforded, and what plaintiffs propose violates neither the letter nor the spirit of §7-104(1).

With reference to a different provision of New York Election Law raised by defendants, the Notice can not be construed as "electioneering" by any stretch of the imagination. It consists of two declaratory sentences, and contains no suggestions or opinions whatsoever. Similarly, by no means can the Notice be described as a "political banner, button, poster or placard." The problem caused by defendants and being

addressed by plaintiffs is candidate-specific and organization-specific, and therefore identification of the candidate and organizations at issue is unavoidable.

Of course the proposed notice "specifically highlight[s]" a single candidate, and the independent body on whose line his name does not appear. To remedy the specific and unconstitutional deemphasis of a particular candidate and a particular independent body by defendants, only a "specific highlighting" will suffice. Overall, giving defendants the benefit of the doubt, they appear utterly to fail to recognize the nature of the harm their enforcement of §7-104(4)(e) is about to cause to all plaintiffs.

## 2. The Conservative Party Case is Clearly Distinguishable

Defendants rely on the recent decision in Conservative Party v. NYSBOE (10 Civ. 6923, S.D.N.Y. 2010) denying a motion for a preliminary injunction, to support their claims herein. The relief sought in the Conservative Party case was the posting of "warning signs against double voting" at each election booth. Such signs are not "similar" to a notice regarding the party affiliation of a single candidate. The request for that relief was denied on the ground, among others, that no showing had been made of a likelihood of success on the merits, unlike in the instant case.

The "challenges" for the state and county boards of elections posed by plaintiffs' request, if any, are certainly less "daunting" than the challenges faced as a result of the request in Conservative Party. For one thing, defendants need not "find[ ] appropriate wording for such a sign," as it has already been spelled out in the Notice. Secondly, plaintiffs are unaware of any requirement that "Justice Department-approval" is necessary for the placement of the Notice, and defendants have not alleged that it would be required in this case. Thirdly, there would be no need to "train[ ] poll watchers to deal with the

DEFENDANT: FRANCISCO JAVIER BARRERA REYES  
CASE NUMBER: CR 24-20-BU-DLC-1

### **SPECIAL CONDITIONS OF SUPERVISION**

1. You must immediately report to U.S. Immigration and Customs Enforcement and follow all their instructions and reporting requirements until any deportation proceedings are completed.
2. If you are ordered deported from the United States, you must remain outside the United States, unless legally authorized to re-enter. If you re-enter the United States, you must report to the nearest probation office within 72 hours after you return.
3. You must submit your person, residence, place of employment, vehicles, and papers, to a search, with or without a warrant by any probation officer based on reasonable suspicion of contraband or evidence in violation of a condition of release. Failure to submit to search may be grounds for revocation. You must warn any other occupants that the premises may be subject to searches pursuant to this condition. You must allow seizure of suspected contraband for further examination.

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## CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments.

	<u>Assessment</u>	<u>JVTA Assessment**</u>	<u>AVAA Assessment*</u>	<u>Fine</u>	<u>Restitution</u>
<b>TOTALS</b>	\$0.00	\$ 0.00	\$ 0.00	\$0.00	\$0.00

The determination of restitution is deferred until  
 (AO245C) will be entered after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Restitution amount ordered pursuant to plea agreement \$

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

<input type="checkbox"/> the interest requirement is waived for the	<input type="checkbox"/> fine	<input type="checkbox"/> restitution
<input type="checkbox"/> the interest requirement for the	<input type="checkbox"/> fine	<input type="checkbox"/> restitution is modified as follows:

\*Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

\*\* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22

\*\*\* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

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## SCHEDEULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A  Lump sum payments of \$ 0.00 due immediately, balance due
  - not later than \_\_\_\_\_, or
  - in accordance with  C,  D,  E, or  F below; or
- B  Payment to begin immediately (may be combined with  C,  D, or  F below); or
- C  Payment in equal \_\_\_\_\_ (e.g., weekly, monthly, quarterly) installments of \$ \_\_\_\_\_ over a period of \_\_\_\_\_ (e.g., months or years), to commence \_\_\_\_\_ (e.g., 30 or 60 days) after the date of this judgment; or
- D  Payment in equal 20 (e.g., weekly, monthly, quarterly) installments of \$ \_\_\_\_\_ over a period of \_\_\_\_\_ (e.g., months or years), to commence \_\_\_\_\_ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E  Payment during the term of supervised release will commence within \_\_\_\_\_ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F  Special instructions regarding the payment of criminal monetary penalties:
 

Criminal monetary penalty payments are due during imprisonment at the rate of not less than \$25.00 per quarter, and payment shall be through the Bureau of Prisons' Inmate Financial Responsibility Program. Criminal monetary payments shall be made to the Clerk, United States District Court, P.O. Box 8537, Missoula, MT 59807 or online at <https://www.pay.gov/public/form/start/79099918>. Please see [www.mtd.uscourts.gov/criminal-debt](http://www.mtd.uscourts.gov/criminal-debt) for more information on how to pay online.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

- Joint and Several
 

See above for Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

  - Defendant shall receive credit on his restitution obligation for recovery from other defendants who contributed to the same loss that gave rise to defendant's restitution obligation.
  - The defendant shall pay the cost of prosecution.
  - The defendant shall pay the following court cost(s):
  - The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA Assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.